United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1229 ORIGINAL

To be argued by
DAVID L. FOX

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In The

United States Court of Appeals

For The Second Circuit

Docket No. 74-1229

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

-against-

ARTICLES OF JEWELRY and WEARING APPAREL and HARRIET SENZ,

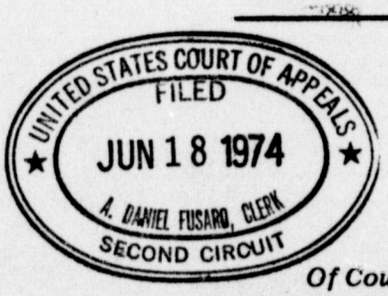
Defendant-Appellee
Cross-Appellant,

IRA SENZ,

Claimant-Intervenor
Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR CLAIMANT-INTERVENOR CROSS-APPELLEE



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BRIEF FOR THE CLAIMANT-INTERVENOR-CROSS-APPELLEE

Preliminary Statement

Defendant-appellee, Harriet Senz, left her husband, Claimant-Intervenor-Cross-Appellee, Ira Senz, in England on September 11, 1968. She has not lived with him since, and

both are embroiled in continuing matrimonial litigation.

Harriet Senz' cross-appeal urges that, if upon reversal of the court below, she is found liable to the United States for customs penalties or duties (Title 19, U.S.C. §§ 1497 and 1595 -- failure to declare), then her husband, Ira Senz, should be held ultimately responsible.[1]

The lower court found that Harriet Senz was not liable for any penalty. It dismissed for mootness her cross-claims against Ira Senz. In fact, the lower court heard no evidence on these cross-claims. Despite all this, Harriet Senz here still argues that, if she is liable to the United States for customs duties, then, as a matter of law, Ira Senz should pay those duties as "necessaries".

The statement of facts and points below are addressed solely to the issues and merits of Harriet Senz' cross-claims.

---

[1] No claim has ever been asserted by the United States against Ira Senz.

Questions Presented

1. Did Harriet Senz prove that Ira Senz failed to pay duty or to make any required customs declarations?

2. Can Ira Senz be held liable for a penalty under either § 1497 or § 1595 of Title 19?

3. Is Mrs. Senz' claim for necessaries barred by the prior institution and pendency of a state court action for the same relief?

4. Did the District Court have jurisdiction of Mrs. Senz' cross-claims?

Facts

On September 11, 1968, Harriet Senz, cross-appellant, abandoned her husband, Ira Senz, cross-appellee (A45), in London, England. With her clothes and jewelry, she boarded a TWA flight to New York. Upon arriving alone at Kennedy Airport (A47), Mrs. Senz was stopped by customs agents for failing to declare eight items of jewelry and two items of clothing. Customs claimed all ten were of foreign origin.

In March, 1970, plaintiff-appellant, United States,

commenced this action for forfeiture of the jewelry and clothing against Harriet Senz.

Ira Senz was served with notice of the commencement of this action on or about March 6, 1970. At that time and since September 11, 1968, Mr. Senz was living apart from his wife and involved in extended matrimonial difficulties including litigation with her (Supreme Court of the State of New York, County of New York, Index No. 35601/71; see, too, A47).

At the time Ira Senz filed his notice of claim and answer, on April 22, 1970, no answer had been submitted on behalf of Mrs. Senz, notwithstanding the fact that she had already been represented by two different firms of attorneys. A prime basis for the filing of the claim and answer by Ira Senz was to prevent a default by Harriet, thereby preserving the rights of Harriet and himself and to avoid any forfeiture which might occur as a result of Mrs. Senz' continual changing of attorneys. On the trial, we did not press the issue of title between Mr. and Mrs. Senz and do not do so here.

Five days before the trial of this action, Harriet Senz moved to amend her answer and then, for the first time,

asserted her two cross-claims. They generally alleged that Ira Senz should be liable for any penalties or duties Harriet Senz is required to pay.

Argument

Assuming Mrs. Senz is held liable for customs penalties, she cannot recover those penalties from her husband, because:

I. As a matter of fact, all of defendant's proof supports the conclusion that Mr. Senz, prior to defendant's re-entry in 1968, had declared and paid duty on items of jewelry in question (Point I).

II. As a matter of law, Ira Senz cannot be held liable for any penalty due under Title 19, § 1595(a) and (b) because on September 11, 1968, he neither directed, assisted nor was in any way concerned with his wife's importation of her personal jewelry purchased and given to his wife abroad long before her return to the United States (19 CFR § 10.17(c), Point II).

III. A presently pending state action for "necessaries"

between Harriet and Ira Senz bars the assertion of a claim for necessaries here (Point III).

IV. This court lacks jurisdiction of the cross-claims because Mr. and Mrs. Senz are both residents of New York State and her cross-claims are not pendent to the Government's claim.

POINT I

UPON THE TRIAL, ALL OF THE EVIDENCE WAS THAT MR. SENZ HAD DECLARED AND PAID DUTY ON THE ITEMS IN QUESTION.

Harriet Senz testified throughout the trial that her husband, Ira Senz, had, prior to September, 1968, declared and paid duty on her foreign jewelry and clothes (A56-57, 68 and 108).

Specifically, Harriet Senz identified Ira Senz' signature on a September 22, 1965 Customs Declaration produced by the Government (Ex. N in evidence, A25, A98). That declaration specifically mentioned personal jewelry and Mrs. Senz testified, she heard Mr. Senz orally declare "personal jewelry" (A94). In addition, on cross-examination, she con-

ceded that the customs agent "looked at the jewelry closely" and that Mr. Senz told the customs agent that the jewelry in the roll was "her usual jewelry that she travels with." (A98-100).

Mrs. Senz identified two items of jewelry as having been given to her by persons other than her husband (Nos. 4 and 6). A Mr. Samuel Landow gave Mrs. Senz the coral ring in evidence as Item 4 (A54). Item No. 6 was given to her by a Mr. Louis Bergman (A76).

Mrs. Senz' cross-claim is premised upon Ira Senz' alleged failure to declare or pay duty. Harriet Senz' testimony proves the contrary. Moreover, with regard to Items 4 and 6, Harriet's testimony established that Ira was neither the donor nor the importer and, therefore, cannot be held liable for any duty or penalties attributable thereto.

POINT II

MR. SENZ CANNOT BE HELD LIABLE FOR A PENALTY DUE UNDER TITLE 19 § 1497 AND 1595.

Although paragraphs 7 and 8 of Harriet L. Senz' amended answer do not assert a claim for recovery from Mr.

Senz of any penalty which may be adjudged against Mrs. Senz, the relief requested by Mrs. Senz against her husband appears to demand that Mr. Senz be held liable therefor. Assuming that we read this claim correctly, there is no authority for such relief for the following reasons:

§ 1497 and § 1595 of Title 19 require a showing that the person to be penalized, either

(a) "on arriving" in the United States failed to make a declaration (§ 1497); or

(b) directed, assisted financially or otherwise, or was in any way concerned in an unlawful activity in the importation or bringing in to the United States of an article contrary to law (§ 1595(a) and (b)).

Obviously, Mr. Senz neither arrived in the United States, nor failed to declare within the meaning of § 1497. Equally obvious is that he lacked the scienter required by § 1595(a) and (b)).

Harriet Senz' cross-claim seeks to thrust upon her estranged husband any monetary penalty for which she may be held liable.

Under New York law, which clearly governs the marital affairs of Mr. and Mrs. Senz, a husband cannot be held liable for either the criminal or tortious acts of his wife unless he coerced or instigated her acts (General Obligations Law § 3-313). His "coercion or instigation shall not be presumed, but must be proved." (Id.) Thus, a husband, who was not shown to know of or instigated his wife's acts which resuted in damages to a third person, was not liable therefor (Stauble v. Finzelberg, 188 Misc. 321, 72 N.Y.S.2d 385 (App. Term, 2d Dept., 1947)). Indeed, even when earlier statutes still authorized suits against a husband for torts by his wife, New York's Court of Appeals held that the wife was solely responsible for torts connected with property under her exclusive ownership (Rowe v. Smith, 45 N.Y. 23 (1871)).

There is not a scintilla of evidence, nor indeed even a claim, that Mr. Senz "coerced" or "instigated" Harriet's acts, and accordingly, there is no conceivable basis for holding him liable for payment of any penalty.

POINT III

MRS. SENZ' CLAIM FOR NECESSARIES IS BARRED BECAUSE SHE HAS PREVIOUSLY INSTITUTED, AND HAS NOW PENDING, ANOTHER ACTION IN NEW YORK'S SUPREME COURT FOR THE SAME RELIEF.

Prior to December, 1971, Mrs. Senz instituted, in the Supreme Court, State of New York, New York County (Index No. 35601/71) by the service of an indorsed summons, an action against Ira Senz for a legal separation (certified copies of the summons and other papers referred to herein were submitted to the District Court). In that action, Mrs. Senz sought, inter alia, a money judgment for necessaries and counsel fees.

Thereafter, in December, 1971, Mrs. Senz

(a) obtained an order of sequestration of her husband's New York property, which was thereafter vacated; and

(b) incurred legal expenses by reason of her retention and then dismissal of five separate law firms, which has resulted in the assertion of a claim, by one such firm, against Mr. Senz in New York's Supreme Court for services rendered as necessaries to his wife. (This action (Index No. 2550/69) was settled by Mr. Senz in the spring of this year.) Both of these actions are matters of public record of which this court may take judicial notice at any stage of this action (FRCP, Rule 44).

The pendency of these actions bars the assertion

of Mrs. Senz' claim for necessaries here. (Witmar Salvage Corp. v. C. W. Blakeslee & Sons, Inc., 308 F.Supp. 395 (S.D.N.Y., 1969)). As in Witmar, the relevant considerations here are:

1. There is a unity of issues in both litigations -- for Mrs. Senz seeks to establish her right to recover necessaries in both;

2. More complete relief can be granted in the New York courts, because the court there will be able to consider both her rights to and the amount of any necessaries; and

3. Allowing Mrs. Senz to proceed here to recover a portion of her necessaries, would not avoid the need to relitigate these issues in New York, and would have no bearing on her claims for support and maintenance in the New York courts.

POINT IV

THE COURT LACKS PENDENT JURISDICTION OF MRS. SENZ' CROSS-CLAIMS.

Both Mr. and Mrs. Senz are residents of, and domiciled in, the State of New York. Mrs. Senz' cross-claims

against Mr. Senz arise out of their marital relationship, not out of the Government's customs action. Those marital issues are predominantly of state concern and warrant consideration by state courts. As Mr. Justice Brennan said in United Mine Workers v. Gibbs, (383 U.S. 715, 726-727 (1966)).

> " ... pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims,... similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedies sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals."

Assuming, arguendo, that the District Court had the power to determine Mrs. Senz' cross-claims, as a matter of discretion, it had to refuse to exercise it. Mrs. Senz' separation action is the proper forum for her assertion of all claims for necessaries.

Conclusion

FOR THE FOREGOING REASONS, THE DISMISSAL OF HARRIET SENZ' CROSS-CLAIMS SHOULD BE AFFIRMED.

Respectfully submitted,

AUSTRIAN, LANCE & STEWART, P.C.
Attorneys for Claimant-Intervenor
Ira Senz

By s/ Mark J. Kronman
A Member of the Firm

Of Counsel:

Mark J. Kronman
David L. Fox

U,S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

U.S.A.,

Plaintiff-Appellant,

against

ARTICLES OF JEWELRY and WEARING APPAREL and HARRIET SENZ,

Defendant-Appellee ~~Cross-Appellant.~~

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

being duly sworn,

I, Victor Ortega,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 18th day of June 1974 at 40 W. 57th St., New York
225 Cadman Plaza, Brooklyn, N.Y.

deponent served the annexed Brief for Claimant-Intervenor Cross-Appellee upon

Philips, Nizer, Benjamin, Krim & Ballon-Attorneys for Def.-Appellee Cross-Appellant
David Trager-U.S. Attorneyfor the Eastern Dist.-Attorney for Appellant

the in this action by delivering ~~a~~ true copy ~~of~~ thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

Sworn to before me, this 18th day of June 19 74

VICTOR ORTEGA

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975